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Pherrel Draper v. J. B. & R. E. Walker, Inc : Brief of Appellant

Utah Supreme Court

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7214

In the
SUPREME COURT
of the
STATE OF UTAH

PHERREL DRAPER,
Plaintiff and Respondent,

vs.

J. B. & R. E. WALKER, INC.,
a corporation,
Defendant and Appellant.

Case No. 7214

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STATEMENT OF FACTS

Plaintiff in his complaint claims to be the owner of property therein described and alleges that the Old Mill Tavern, Inc., a corporation, in May of 1942 filed of record a mortgage in which the Old Mill Tavern, Inc. mortgaged certain property, including plaintiff's property, to the defendant corporation. The complaint sets forth the fact that plaintiff had made a demand upon the defendant corporation, as mortgagee, to release the property from the mortgage and alleges the refusal of the defendant corporation to execute the release form pre-

sented to it. The prayer of the complaint asks for the determination of the Court that the mortgage is null and void as to the property therein described and for damages in the sum of $547.00.

The defendant filed a motion to strike from the complaint all allegations as to damages as contained in Paragraph 9 of the complaint and filed a general and special demurrer to the complaint and particularly to Paragraph 9.

At the hearing on the demurrer and motion to strike, counsel for plaintiff submitted that the special demurrer was well taken, and, the demurrer and motion having been taken under advisement by the Court, both pleadings were subsequently denied by the Court in their entirety. Defendant then filed its answer in which it admitted that the plaintiff was the owner of the property, disclaimed any right or title to the property and consented that judgment be entered quieting plaintiff's title against the defendant.

At the trial of the cause the plaintiff moved to amend the complaint by asking for an order of the Court requiring the defendant to release the mortgage of record which amendment was permitted over the objection of the defendant.

The testimony of the plaintiff was to the effect that some five years after the mortgage was of record he found out about it when he sought to obtain a loan on the property and at that time had a release prepared for which he paid $25.00 and which he submitted to the de-

fendant for execution. All of this was done before any attempt had been made to contact the defendant corporation. The plaintiff as Page 43 of the transscript states he was employed at $14.00 a day and received double time for his Saturday and Sunday work. He claims his damages for the time expended on Saturdays and Sundays which are double time days for him in attempting to make contacts with the defendant corporation to secure the release. The plaintiff and the President of the defendant corporation live within the same vicinity in Cottonwood in Salt Lake County, and Plaintiff never attempted to reach him at the office or at his home and yet on one occasion the plaintiff claims he made a trip to Ogden to try to locate Mr. Walker when he didn't know nor is there any evidence that Mr. Walker was in Ogden or doing any work in Ogden, and the testimony further shows that the plaintiff never tried to locate Mr. Walker at his home or his office before he left on the Ogden trip as appears at Page 81 of the transcript.

When the plaintiff contacted the office girl at the defendant corporation after he had spent his time going to Ogden, he was immediately informed to contact counsel for defendant, and several conferences were then held and a release prepared to be executed and an understanding arrived at that a release would be given on each party putting up the sum of $30.00, having a survey made of the property line and the fence line readjusted to meet the true survey line. This appears at Page 69 of the Record. The plaintiff states that he has a violent temper and being provoked in missing an appoint-

ment at which he was late he then determined not to proceed under the agreement for the survey, and this suit was commenced. All of this appears at Page 71 of the Record.

At Page 92 of the Record appears the testimony showing that a complete understanding had been arrived at between counsel, providing for the survey and correcting of the fence lines to meet the results of the survey.

At Page 93 of the Record is the testimony showing that the mortgage between the Old Mill corporation and J. B. and R. E. Walker corporation had never been paid.

The Court took the matter under advisement and subsequently entered its judgment quieting the title of the plaintiff in the property and affirmatively directing the defendant to execute a release of the mortgage and giving to the plaintiff judgment of $397.00 against the defendant together with costs of $13.20.

SPECIFICATION OF ERRORS

1. The Court erred in overruling the general demurrer of the defendant corporation.

2. The Court erred in overruling both grounds of the special demurrer of the defendant corporation.

3. The Court erred in denying the defendant's motion to strike Paragraph 9 from the complaint.

4. The Court erred in making its fifth Finding of Fact in this that it found that the plaintiff has at all times refused and failed to release or cancel the mortgage, which finding is contrary to the evidence; that though

the word "plaintiff" may have been used inadvertently, should the word be "defendant," said finding is still contrary and is not supported by the evidence.

5. The Court erred in its sixth Finding of Fact wherein it found that plaintiff has suffered damages by reason of the refusal to release the mortgage by the defendant in the sum of $225.00 for attorneys' fees for the reason that said finding is contrary to law and not supported by the evidence.

6. The Court erred in its sixth Finding of Fact wherein it found that plaintiff has suffered damages in the sum of $172.00 by reason of loss of time in that said finding is contrary to law and not supported by the evidence.

7. The Court erred in its 7th Finding of Fact wherein it found that J. B. Walker was an officer of the Old Mill Tavern, Inc., and the defendant corporation for the reason that said finding is not supported by the evidence, is contrary to the law and is outside of any issue involved in this proceeding.

8. The Court erred in making its second Conclusion of Law wherein the Court concludes that defendant should be awarded judgment in the sum of $397.00 for the reason that said conclusion is contrary to law.

9. The Court erred in its second Conclusion of Law wherein it assessed costs in the sum of $13.20 for the reason that said conclusion is contrary to law and there has been no cost bill filed in this case.

10. The Court erred in its third Conclusion of Law requiring an order of the court issued to the defendant to release its mortgage of record, as said conclusion is contrary to law.

11. The Court erred in entering its judgment and decree in favor of the plaintiff ordering the defendant to deliver to the plaintiff a release of the mortgage described in said judgment, as said order is contrary to the law.

12. The Court erred in entering its judgment and decree awarding damages to the plaintiff and against the defendant as appears in Paragraph 3 of said judgment in the sum of $397.00 for the reason that such judgment and decree is contrary to the law.

13. The Court erred in entering its judgment as appears in Paragraph 3 thereof awarding to the plaintiff costs in the sum of $13.20 as said judgment is not supported by a cost bill and is contrary to law.

14. The Court erred in permitting the plaintiff to make the amendment to the complaint, as appears at Page 41 of the Record, for the reason that said amendment is contrary to law, was not made timely, and changed the cause of action without permitting the defendant an opportunity to clarify said issues by pleading or preparation to meet said new issue.

15. The Court erred in its rulings on the presentation of evidence in overruling defendant's objections and permitting plaintiff to introduce testimony as to damage suffered by plaintiff.

ARGUMENT

I.

The Defendant Is Not Liable To Plaintiff For The Damages Provided In 78-3-8, U.C.A. 1943.

For the assistance of the Court this statute provides:

> "If the *mortgagee* fails to discharge or release any mortgage *after the same has been fully satisfied,* he shall be liable to the *mortgagor* for double the damages resulting from such failure. Or the *mortgagor* may bring an action against the *mortgagee* to compel the discharge or release of the mortgage after the same has been satisfied; and the judgment of the court must be that the *mortgagee* discharge or release the mortgage and pay the *mortgagor* the costs of suit, and all damages resulting from such failure."

Under this section the cause of the action which it gives is specified:

(a) In favor of the *mortgager* and against the *mortgagee* in those circumstances where a *mortgage has been fully satisfied.*

(b) The other situation provided by this section is that the *mortgagor* may bring an action against the mortgagee to compel the release of a mortgage *after the same has been* satisfied, in which instance the court must order the mortgagee to release and discharge the mortgage and pay the *mortgagor* the cost of suit and all damages resulting from such failure.

In the case of Hasquet v. Big West Oil Company, 29 Fed. R. 2d Page 78, the court sets forth the fundamental rule:

> "No right of action for damages exists at common law from failure to satisfy a mortgage or to release or discharge a lien or other claim against real property."

This proposition is further substantiated in the case of Morrill v. Title, 162 P. 360, in which the court states:

> "It was stated that no damages were recoverable at common law for failure to satisfy a mortgage * * * and that the only right of action was in equity. That this is undoubtedly true is clearly shown by the absence of decisions allowing damages under the common law and by the course of legislation in the United States. * * * To approve the rule contended for by counsel for plaintiffs would be nothing less than to engage in judicial legislation which we must refuse to do."

The further proposition has been substantiated in many cases that a statute such as 78-3-8, U.C.A. 1943, is penal in nature and will be narrowly construed, and the relief to be granted under that statute will not be extended beyond its terms, nor will any theory of subrogation be indulged in to extend the relief permitted by such a statute. A few of the cases so holding are the following: Osborn v. Hocker, 160 Ind. 1, 66 N.E. 42; Murphy v. Fleming, 69 Mich. 185, 36 N.W. 787; Wing v. Union Cent. L. Ins. Co., 155 Mo. A. 356, 137 S.W. 11; Bullington v. Lowe, 94 Okla. 234, 221 P. 502; Brandon v. Garland, 211 Ala. 150, 100 So. 132.

One of these cases, that of Hope v. United Savings and Loan Association, 60 P. 2d 737, was an action in

which parties were seeking to extend the benefit of such a right of action of the mortgagor to one beyond that class:

> "The facts are as follows: The defendant in error, who was plaintiff below, and will be so designated in this opinion, brought an action to foreclose a real estate mortgage, claiming a further lien in addition to the principal which had been discharged. Plaintiffs in error, who will be hereinafter designated as defendants, in answer to plaintiff's petition, denied plaintiff's right to any further lien and filed a cross-action for penalty under section 7642, C.O.S. 1921 (section 11266, O.S.1931). The defendants were not the original mortgagors, but were subsequent purchasers of the real estate and owned the same when this action was commenced. There was judgment sustaining defendants' demurrer to plaintiff's evidence; also judgment denying defendants relief on their cross-action. Defendants appeal from the judgment denying relief on their cross-petition.
>
> "Defendants in their petition in error brief several questions, including that of novation, in order to bring themselves within the status above cited. This question was not pleaded below. And, although it is insisted that evidence on the question was introduced without objection, the same falls short for such purpose, in that the original mortgagor was not released from the debt.
>
> "(1) We are of the opinion that there is but one question involved in this case; that is, whether or not the subsequent purchaser of mortgaged real estate may recover the forfeit provided by section 11266, supra. On the authority of the following cases decided by this court it seems con-

clusive that statutes penal in their nature must be strictly construed and limited to operate only in favor of those included in the statutory description of designation: Territory ex rel. Johnston v. Woolsey, 35 Okl. 545, 130 P. 934; Baugh v. Little et al., 140 Okl. 206, 282 P. 459; Bullington v. Lowe, 94 Okl. 234, 221 P. 502.

"(2) It is true that the precise question here presented has not heretofore been decided by this court, but the cited cases clearly disclose that the rule of strict construction is applied to such statutes in confining their operation, and there is no provision therein that the rights conferred thereby shall extend to the assignee of the mortgagor, and we do not now feel justified in extending the statute by implication to include such persons. We find that this provision of our statute has had consideration by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Capps v. U. S. Bond & Mortgage Co., 274 F. 357, and there the court, after reviewing authorities of eminent standing, held that the statute did not apply in cases such as this. We agree with the reasoning and conclusion in such opinion."

In the case of Ernest Graham v. Edward Sinderman, 238 Mich. 210, 213 N.W. 200, an owner of property mortgaged the property to a broker who forged the documents so given him and sold them to the defendant. In that case the plaintiff owner of the property who had never received any consideration for his mortgage sought to have it released of record and to recover double damages against the defendant. The court refused to permit a recovery under such a statute as ours, stating:

> "Plaintiff asks that defendant be made to pay the penalty fixed by statute for refusal to discharge the mortgage. This may not be done. The statute relates to mortgages *satisfied by payment* or *full performance of the conditions thereof.*"

We submit that the cause of action permitted by this statute rests only in one who is a mortgagor and who is amortgagor whose mortgage has been fully satisfied. In the principal case the plaintiff was never a party to the mortgage involved. There is no contradiction to the fact that the mortgage has never been satisfied. The authorities we have cited above are clear to the effect that the term "mortgagor" will not be enlarged upon to include one whose property has been included in the mortgage.

There is no relationship between the Old Mill Tavern, Inc., and the plaintiff. There is no showing that the plaintiff ever before or after the mortgage was placed of record derived his property from or through the Old Mill Tavern, Inc. In order to permit a cause of action in the plaintiff it is incumbent upon the plaintiff to bring himself within the class of a mortgagor. It is inconceivable of any theory under which the court could assume to make the plaintiff a mortgagor in any respect because he has never submitted his property as being subject to the provisions of the mortgage nor was there in any way any benefit he received by reason of the mortgage. It is likewise inconceivable that because some third person places a mortgage upon my property that I thereby become a party to the mortgage. As impossible

as it appears to formulate any theory upon which the plaintiff could become a mortgagor or come within such a class, it becomes further impossible to understand how he can receive the benefit of the statute which permits relief only in those instances where the mortgage has been satisfied. The only evidence in the entire case and the actual fact is that this mortgage has not been paid.

We submit that there is no cause of action to the plaintiff under the provisions of this statute, and the court is entirely and grossly in error in permitting the plaintiff to recover by virtue of its provisions.

II.

The Court Erred In Permitting The Amendment In Allowing The Affirmative Relief For The Release Of The Mortgage And In Denying The Motion To Strike And The Special Demurrer, All Of Which Are Combined Under This One Argument.

As indicated in connection with the statute 78-3-8, there are two options as to the cause of action available to the plaintiff. It is submitted that he could avail himself of only one of them and not both. In other words, he may sue for double damages or he may sue to have the mortgage released and all damages from such failure, or he could sue in equity to quiet title against the land.

It is submitted that upon the plaintiff bringing his cause of action, as set forth in his complaint, his complaint was fatally defective and did not state a cause of action to permit the recovery of any relief other than that of quieting title, because there is nowhere contained in the complaint any allegation that the mortgage had

been satisfied. There is no allegation of payment appearing whatsoever.

The defendant was unable to determine from plaintiff's complaint which of the two causes of action provided by 78-3-8 the plaintiff was pursuing, or whether an action only to quiet title.

It is submited that, under special demurrer, we were entitled to have this theory clarified, were entitled to be advised in any event.

III.

The Court Erred In Entering Its Judgment Awarding The Plaintiff Damages, As There Was No Evidence Or Findings Upon Which Such Judgment Could Be Predicated.

We are combining under this argument our specifications of error 5, 6, 8, 12 and 15.

In this matter the evidence introduced over defendant's objection as to damage was to costs and time lost by the plaintiff long prior to any demand for release which was made on the defendant corporation and would not be competent in any event. As a second proposition, it is submited that the time which the plaintiff took off and his time in court, all of which he was permitted to testify to, could not be included as an element of damage, particularly when it appears that the time for these appointments was not time which required him to lose work.

The findings do not show what the element of damage was, whether from time loss, loss from interest on mortgage, or any other elements claimed by the plaintiff, and are so uncertain that they would not support the con-

clusion or judgment as to any damage suffered by the plaintiff.

IV.

The Court Erred In Awarding To The Plaintiff Attorney's Fees.

There was no known evidence introduced in this case as to any work that had been done by an attorney in this case nor was any testimony introduced as to the reasonable value of any such work, and under the determinations of this court we submit that the court must require testimony before entering such judgment. It is further submitted that the item of attorney's fees is not recoverable under the penalty provided by this statute as it would not be an element of damage recoverable to the plaintiff unless specifically provided as such by the statute.

V.

The Court Erred in Entering Judgment For Costs Without A Cost Bill.

As there was no waiver or stipulation in this case, we submit that the court erred in entering judgment including and specifying the costs recoverable by the plaintiff. This court has so often ruled that we will not add length to this brief by citing authorities for the fact that those costs are only recoverable upon the furnishing of a cost bill.

Respectfully submitted,

McKAY, BURTON, NIELSON and RICHARDS

Attorneys for Defendant and Appellant.